KA WAH BANK LTD.

v.

LIM HUN BENG & ORS.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. 1018 OF 1984]
20 OCTOBER 1986

CIVIL PROCEDURE: *Application by plaintiff to enter judgment under O. 27 r. 3 of the Rules of the High Court 1980 - Admission of fact by defendants - Question of illegality raised by defendants - Question of law - Triable issue - Whether judgment can be given - Question of law to be argued in the form of special case stated under O. 33 r. 2.*

The plaintiff's claim against the defendants is for repayment of an overdraft and term loan in the sum of HK$1,618.84 and US$1,099,488.77 respectively (as at 30 November 1984) with interest and costs.

The defendants in their defence admitted owing the money to the plaintiff but denied liability on grounds of illegality - namely, that the plaintiff paid the said sums in Hong Kong, which is outside the scheduled territories to or for the credit of the 1st defendant who was at all material times a person resident in Malaysia without the permission of the Controller of foreign exchange and a breach of s. 4 of the Exchange Control Act 1953 ("the Act") and that by recovering payments of the said sums, the plaintiff would be causing the defendants to breach ss. 8 and 9 of the Act.

The plaintiff applied to enter final judgment against the defendants under O. 27 r. 3 on the ground of admission of fact.

Held:

[1] There was an admission of fact by the defendants contained in the defence in that they owed the money and failed to repay the same.

[2] The defence raised by the defendants alleged illegality (and thus irrecoverability of the monies) which is a defence based on law.

[3] Judgment under O. 27 r. 3 may only be granted on admission of fact.

[4] A triable issue on point of law has been raised by the defendants.

[5] To avoid delay, the question of law was ordered to be stated in the form of a special case under O. 33 r. 2 to be argued in open Court at a date to be fixed.

[6] Parties cannot agree under and for purposes of O. 33 r. 2 without first obtaining as order of the Court to state questions of law in the form of a special case.

[Matter to be argued in open Court at date to be fixed.]

Legislation referred to:
Exchange Control Act 1953, s. 4.
Rules of the High Court 1980, O. 18 r. 19, O. 27 r. 3, O. 33 r. 2

Other sources referred to:
The White Book, 1985 Edn., para.27/3/1, p. 516.

For the plaintiff - Hishammuddin Hussein Onn; M/s. Skrine & Co.
For the defendants - Ong Chye Lee; M/s. Jayaraman, Ong & Co.

JUDGMENT

Mohamed Dzaiddin J:

The plaintiff's claim in this suit against the defendants is for repayment of an overdraft and term loan in the sum of HK$1,618.84 and US$1,099,488.77 respectively as at 30 November 1984 with further interest and costs.

By the statement of claim filed on 6 December 1984, at the request of the defendants the plaintiff granted overdraft facilities in Hong Kong dollars and a term loan of US$1.5 million to the 1st defendant, which said facilities were granted for the 2nd and 3rd defendants. In addition, the 3rd defendant executed a charge in favour of the plaintiff secured by nine pieces of land identified as No. 8 Leith Street, Penang held under H.S. (D) 20, 21, 29, 37, 42, 48, 49, 51 and 52, town section 19 north east district, Penang. The said facilities were payable on demand and by telex communication dated 11 July 1984 the plaintiff demanded immediate payment of the said loan. This was followed by the plaintiffs' letter dated 14 August 1984 to the 1st and 2nd defendants demanding full payment of the loan and the overdraft. It is further alleged by the plaintiff that by telex communication dated 20 August 1984 the 1st defendant agreed to settle the outstanding sum by the end of October 1984, by which date the 1st defendant had defaulted to pay any sum at all. Hence, the plaintiff commenced this action.

By their defence dated 25 March 1985 the defendants admitted that there was money owed to the plaintiff but denied that the plaintiff are entitled to recover forth them the said loan and overdraft on the ground of illegality. In para. 5 of the defence the defendants state as follows:

> The Overdraft and the Loan granted to the 1st defendant referred to in the statement of claim were made by the plaintiff paying the said sums in Hong Kong (outside the scheduled territories) to or for the credit of the 1st defendant who was at all material time a person resident in Malaysia without the permission of the Controller of Foreign Exchange and in breach of s. 4 of the Exchange Control Act 1953 (hereinafter referred to as "the said Act"). In seeking to recover payments of the Overdraft and the Loan from the defendants, the plaintiff would cause the defendants to breach s. 8 and 9 of the said Act.
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> In the premises the Overdraft and the Loan were and are illegal and are unrecoverable by the plaintiff.

On 9 May 1985 the plaintiff filed this application asking this Court to strike out para. 5 and 6 of the defence under O. 18 r. 19 of the Rules of the High Court 1980 and/or under the Court's inherent jurisdiction. In addition the plaintiff have also prayed for final judgment to be entered for a plaintiff under O. 27 r. 3 of the Rules of the High Court 1980. This application is supported by an affidavit dated 3 May 1985 affirmed by Mr. Loh Yoon Kwai, an advocate and solicitor who was having charge of the matter at the material time. The relevant part of the affidavit stated that the overdraft and the loan referred to in the statement of claim were granted in Hong Kong. The overdraft was utilised by the 1st defendant in his current account maintained with the plaintiff in Hong Kong. As for the loan of US$1.5 Million, the money was utilised by the 1st defendant to repay the debt due by the 3rd defendant to Sin Poh (Star News) Amalgamated Ltd. in Singapore. There is exhibited to this affidavit a letter from the 1st defendant to the plaintiff authorising the latter to remit the said sum in Singapore dollars to Sin Poh being settlement of the letter of guarantee.

Neither of the defendant has filed in an affidavit-in-reply to this application. Mr. Charles Ong, Counsel for the defendant merely stated that his submission would be on points of law as raised in para. 5 of the defence.

At the outset of this proceeding, en. Hishammuddin, Counsel for the plaintiff, informed me that he was only making this application under O. 27 r. 3 of the Rules of the High Court 1980 and would abandon his application to strike out the defence under O. 18 r. 19. Order 27 r. 3 States:

> Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this rule may be made by summons.

It is now clear that the issue to be determined is whether the plaintiff is entitled to judgment on admissions of fact based on the defence. *The White Book* [1985] Edn. under para. 27/3/1 (p. 445), says that admission may be express or implied but must be clear. In the present case, after considering the defence I am satisfied that there is an admission of fact by the defence that they owed money from the plaintiff and they failed to repay the sums outstanding as pleaded in para. 6, 7, 8, 9 and 10 of the statement of claim which they admitted in their para. 4 of the defence. However this is not the end of the matter. As can be seen from para. 5 of the defence and defendants have gone a step further whereby they averred that the overdraft and the loan given by the plaintiff to the defendants were illegal and as such un recoverable contrary to s. 4 of the Exchange Control Act 1953. Pausing here, it is quite clear that the defence of the defendants is on law which under O. 27 r. 3, judgment may only be granted on admissions of fact. There is therefore a triable issue on point of law having been raised by the defendants in their defence.

Thus, in the circumstances of the present case, in order to avoid further delay in its disposal, I am now invoking O. 33 r. 2 by directing that a question or issue be stated in the form of a special case. I am aware that both Counsel have submitted on the point of law involved at the last hearing. However in view of the requirement of O. 33 r. 2, the matter will have to be argued in open Court as a case stated. In this regard, both Counsel should be aware that, according to the commentary in 1985 *White Book* at p. 516, the parties cannot under this rule agree between themselves, without obtaining the order of the Court to state questions of law in form of a special case. If a special case is directed by the Court, it should be signed or settled by both parties. The question of law should be carefully and precisely framed.

Accordingly, I order that the point of law involved be settled by Counsel and the matter be argued in open Court at the date to be fixed by the Senior Assistant Registrar.

Also found at [1987] 1 CLJ 480